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**VIA ELECTRONIC MAIL**

Jeff S. Jordan  
Federal Election Commission  
Office of Complaints Examination and Legal Administration  
Attn: Christal Dennis  
1050 First Street, NE  
Washington, DC 20463

**Re: MUR 7505**

Dear Mr. Jordan:

On behalf of End Citizens United and Deanna Nesburg, in her official capacity as Treasurer (collectively, the "Committee"), we write in response to the Complaint filed by Kyle Whatley. The Complaint alleges that a fundraising solicitation distributed by the Committee (the "Solicitation"), which was used to raise money for the Committee and Beto for Texas, should have been reported as either a coordinated communication or an independent expenditure. The Complaint is incorrect: the Solicitation was not coordinated with Beto for Texas or its agents, nor, under Commission precedent, did it contain express advocacy. Accordingly, the Commission should find no reason to believe that the Committee violated the Act or Commission regulations.

**FACTUAL BACKGROUND**

End Citizens United is a multicandidate committee that is registered with the Commission. Its mission is to "end Big Money in politics and fix our rigged political system by electing campaign finance reform champions."<sup>1</sup> Consistent with this mission, the Committee's primary method of fundraising is to raise small-dollar donations through the website ActBlue.com.

<sup>1</sup> See End Citizens United, About Us, at <https://endcitizensunited.org/about/> (last visited Nov. 13, 2018).

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One of the methods used by the Committee to raise funds for itself and its supported committees is through paid solicitations placed on social media websites, such as Facebook.<sup>2</sup> These solicitations link to an ActBlue fundraising page where the viewer can donate to the supported committees.

The Solicitation was one such solicitation that was prepared by the Committee to raise funds for the Committee and for Beto for Texas, the principal campaign committee of Representative Beto O'Rourke. Because Rep. O'Rourke's platform championed the same issues that are supported by the Committee, the Committee distributed the Solicitation to direct grassroots, low-dollar donors to support Rep. O'Rourke's campaign, as well as the Committee itself.<sup>3</sup> The Solicitation linked to a "Split It" page prepared by the Committee that permitted donors to donate to the Committee and Beto for Texas.<sup>4</sup>

The Solicitation was developed by Committee fundraising staff and consultants for the sole goal of raising funds for the committees, and not to influence the voting behavior of any voters.<sup>5</sup> Because it was apparent from media coverage and other public records that Rep. O'Rourke had national appeal, the Committee chose to distribute the Solicitation nationwide; in fact, only 6 percent of the impressions were viewed by individuals in Texas who could vote for Rep. O'Rourke.<sup>6</sup> The Committee did not discuss the Solicitation, or any similar solicitations, with Rep. O'Rourke or Beto for Texas, and it made all decisions regarding the Solicitation based on its own fundraising imperatives, and not based on any nonpublic information provided by Rep. O'Rourke or Beto for Texas.<sup>7</sup>

#### LEGAL ANALYSIS

The Complaint alleges that the Solicitation was either a coordinated communication or an independent expenditure. It is incorrect on both accounts.

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<sup>2</sup> Declaration of Andrew Laskar ("Laskar Decl."), ¶ 2.

<sup>3</sup> See *id.*, ¶ 5.

<sup>4</sup> *Id.*, ¶ 6. The Commission approved of this fundraising method in Advisory Opinion 2014-13.

<sup>5</sup> *Id.*, ¶ 8.

<sup>6</sup> *Id.*, ¶ 7.

<sup>7</sup> See *id.*, ¶¶ 8-11.

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**I. The Solicitation Was Not a Coordinated Communication**

Under Commission rules, a public communication will be treated as a “coordinated communication” if it meets a three-part test: (1) it is paid for by a third party, (2) it contains certain content, and (3) it is made following certain types of conduct.<sup>8</sup> The Commission need go further than the conduct prong to resolve this matter. The Complaint does not point to any specific conduct on the part of the Committee or Beto for Texas that would result in coordination, and the Complainant admits that he is “not privy to the internal discussions and contacts of” the Committee.<sup>9</sup>

In fact, there was no coordination between the parties. As stated in Mr. Laskar’s sworn declaration, Beto for Texas, Rep. O’Rourke and their agents (the “O’Rourke Parties”) did not request or suggest that the Committee sponsor the Solicitation or any similar solicitations.<sup>10</sup> The Committee and the O’Rourke Parties did not discuss the Solicitation or any similar solicitations, so the O’Rourke Parties did not assent to the Solicitation,<sup>11</sup> nor could there have been any substantial discussion between the parties regarding the Solicitation.<sup>12</sup> The Committee staff responsible for decisions regarding the Solicitation did not possess any information about the O’Rourke Parties’ plans, projects, activities or needs that would be material to the Solicitation; instead, decisions about the Solicitation were made by Committee staff with the sole objective of raising the maximum amount of funds, based on the Committee’s experience with the types of solicitations that are most effective.<sup>13</sup> And the Solicitation was not made by, or with the involvement of, a former employee or consultant, or a common vendor. The Committee staff who worked on the Solicitation had not worked for the O’Rourke Parties during the preceding 120 days,<sup>14</sup> and, according to Commission records, Mothership Strategies, the Committee’s digital fundraising consultant,

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<sup>8</sup> 11 C.F.R. § 109.21(a).

<sup>9</sup> Complaint at 4.

<sup>10</sup> Laskar Decl., ¶ 10.

<sup>11</sup> *Id.*, ¶¶ 9, 10.

<sup>12</sup> *Id.*, ¶ 9.

<sup>13</sup> *Id.*, ¶ 8.

<sup>14</sup> *Id.*, ¶ 11.

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has not been compensated to perform services for the O'Rourke Parties during this election cycle. Accordingly, the Solicitation was not a coordinated communication.

## II. The Solicitation Was Not an Independent Expenditure

An "independent expenditure" is an expenditure that is not made in cooperation, consultation or concert with, or at the request or suggestion of, a candidate, a candidate's authorized committee, a political party, or their agents, and that expressly advocates the election or defeat of a clearly identified candidate.<sup>15</sup> Commission rules provide that a communication contains express advocacy if it either:

(a) Uses phrases such as "vote for the President," "re-elect your Congressman," "support the Democratic nominee," "cast your ballot for the Republican challenger for U.S. Senate in Georgia," "Smith for Congress," "Bill KcKay in '94," "vote Pro-Life" or "vote Pro-Choice" accompanied by a listing of clearly identified candidates described as Pro-Life or Pro-Choice . . . or communication of campaign slogan(s) or individual word(s), which in context can have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidate(s), such as posters, bumper stickers, advertisements, etc. which say "Nixon's the One," "Carter '76," "Reagan/Bush," or "Mondale!"; or<sup>16</sup>

(b) When taken as a whole and with limited reference to external events, such as the proximity to the election, could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s) because – (1) The electoral portion of the communication is unmistakable, unambiguous, and suggestive of only one meaning; and (2) Reasonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidate(s) or encourages some other kind of action.<sup>17</sup>

The first part of the definition describes the so-called "magic words" test that was articulated in *Buckley v. Valeo*<sup>18</sup> and *FEC v. Massachusetts Citizens for Life, Inc* ("MCFL").<sup>19</sup> The second part is derived from the Ninth Circuit's ruling in *FEC v. Furgatch*.<sup>20</sup>

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<sup>15</sup> 11 C.F.R. § 100.16.

<sup>16</sup> *Id.*, § 100.16(a).

<sup>17</sup> *Id.*, § 100.16(b).

<sup>18</sup> 424 U.S. 1 (1976).

The Solicitation is not express advocacy under either standard. It is not express advocacy under section 100.22(a) because it does not contain any of the words enumerated in section 100.22(a), *Buckley*, or *MCFL*, nor is the only reasonable meaning of the Solicitation to “urge the election or defeat of one or more clearly identified candidates.” By its plain terms, the Solicitation does not ask recipients to vote for Beto O’Rourke or against Ted Cruz. Instead, it asks the recipient to donate funds. The Solicitation says “stop what you’re doing and *send Beto \$5 to DESTROY Ted Cruz.*”<sup>21</sup> The only action urged is to financially support Rep. O’Rourke’s campaign. The Solicitation notes that the consequence of doing so will be to “destroy” Ted Cruz, but this statement does not necessarily have electoral implications; it could be read to mean that donating will help “destroy” Senator Cruz’s morale or his legislative agenda just as easily as it could be interpreted to mean that donating will help defeat Ted Cruz electorally.

For similar reasons, the Solicitation is not express advocacy under section 100.22(b). Whether section 100.22(b) is enforceable by the Commission is a question upon which the Commission has deadlocked.<sup>22</sup> But, even assuming that it is, the Solicitation does not qualify as “express advocacy.” As the Ninth Circuit made clear in *Furgatch*, “[s]peech cannot be ‘express advocacy of the election or defeat of a clearly identified candidate’ when reasonable minds could differ as to whether it encourages a vote for or against a candidate or encourages the reader to take some other kind of action.”<sup>23</sup> And, as described above, the Solicitation does not encourage the audience to vote for Beto O’Rourke or against Ted Cruz; the only action advocated is to donate funds to Beto for Congress.

The Commission’s rulemaking history, advisory opinions and enforcement actions all support the conclusion that fundraising solicitations like the Solicitation are not express advocacy communications triggering independent expenditure reporting. In case after case, the Commission has assessed fundraising solicitations separately from express advocacy communications. For example, in adopting former section 100.57, the Commission assessed whether certain statements would result in the

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<sup>19</sup> 479 U.S. 238 (1986).

<sup>20</sup> 807 F.2d 857, 864 (9th Cir. 1987).

<sup>21</sup> Complaint, Exhibit A (emphasis added).

<sup>22</sup> Compare Advisory Opinion 2012-27, Draft A, with Advisory Opinion 2012-27, Draft B.

<sup>23</sup> 807 F.2d at 864.

soliciting organization receiving "contributions" under the Act. It found, for example, that a solicitation that stated "Electing Joe Smith is crucial to our efforts to preserve the environment. Please send money to us so that we can be successful in this cause." would result in the recipient organization receiving contributions. However, the Commission did not find that this statement would qualify as an "expenditure" that would trigger independent expenditure reporting.<sup>24</sup> The Commission took the same approach in Advisory Opinions 2012-11 and 2012-27. The Commission separately addressed whether certain fundraising solicitations would result in the receipt of contributions and whether certain other statements contained express advocacy. But, as in the *Political Committee Status* rulemaking, the Commission did not address whether any of the solicitations contained express advocacy and would be treated as expenditures.<sup>25</sup>

Finally, the method in which the Solicitation was distributed underscores its proper characterization as a fundraising solicitation, and not an express advocacy communication. The Solicitation was distributed nationally, with only a *de minimis* number of impressions seen by individuals in Texas. Thus, it is plain that the purpose of the Solicitation was not to influence the voting behavior of Texans.<sup>26</sup>

In short, the Commission's approach has recognized that fundraising solicitations like the Solicitation are different from independent expenditures because their purpose is to raise money for supported organizations, and not persuade the action of voters. Because the only action urged by the Solicitation was to raise funds for Beto for Texas and the Committee, and not to vote in any particular way, the Commission should find that the Solicitation did not contain express advocacy.

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<sup>24</sup> *Political Committee Status, Definition of Contribution, and Allocation for Separate Segregated Funds and Nonconnected Committees*, 69 Fed. Reg. 68,056, 68,057 (Nov. 23, 2004).

<sup>25</sup> See also First General Counsel's Report, MUR 6082 (Majority Action); First General Counsel's Report, MUR 5440 (Media Fund) (taking the same approach of assessing solicitations and expenditures separately).

<sup>26</sup> See 11 C.F.R. 100.22(a), (b) (permitting limited reference to context in determining whether a communication contains express advocacy); see also Statement of Reasons of Commissioners Petersen, Hunter and McGahn, MUR 6113 (Hollingsworth) (considering contextual factors in determining that a communication did not PASO a federal candidate).

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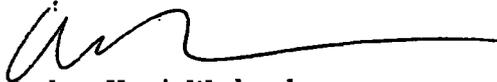
**III. The Public Was Not Deprived of Any Meaningful Disclosure**

Even if the Commission determines that the Solicitation contained express advocacy, and should have been treated as an independent expenditure, there was no public harm here. As the Complaint itself admits, the cost of the Solicitation was under \$1,000, and the Solicitation was distributed after the Texas primary and more than 20 days before the general election.<sup>27</sup> Even if the Solicitation contained express advocacy, it would not have triggered a 24- or 48-hour report.<sup>28</sup> And the expenditure was disclosed as an operating expenditure on Schedule B of the Committee's regular monthly reports. Given the small amount at issue and the lack of any public harm, even if the Commission determines that fundraising solicitations like the Solicitation must be reported on Schedule E instead of Schedule B, the Commission should use its prosecutorial discretion and dismiss this matter without any civil penalty.

**CONCLUSION**

For the reasons described above, the Commission should find that there is no reason to believe the Committee violated the Act, and it should promptly close the file. However, in the event that the Commission adopts a new approach and determines that fundraising solicitations like the Solicitation trigger independent expenditure reporting, the Committee respectfully requests that the Commission issue clear guidelines on this point so that the Committee can adhere to them going forward.

Sincerely,



Andrew Harris Werbrock  
Counsel, End Citizens United  
(00364980)

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<sup>27</sup> See Complaint, Exhibit A.

<sup>28</sup> See 11 C.F.R. § 104.4.



